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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. CURTIS SIMMONS, Petitioner.	2 CA-CR 2009-0291-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20082613

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Law Office of Ronald Zack
By Ronald Zack
Tucson
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B R A M M E R, Judge.

¶1 Curtis Simmons petitions this court for review of the trial court's order dismissing his of-right petition for post-conviction relief, filed pursuant to Rule 32.1, Ariz. R. Crim. P. He argues he had presented colorable claims and therefore was entitled to an evidentiary hearing. He contends the court abused its discretion in denying him a hearing because (1) his prior conviction for possession of drug paraphernalia, which was

more than five years old, did not preclude him from mandatory probation under A.R.S. § 13-901.01; (2) the court had failed to make specific findings of fact whether he had the ability to pay attorney fees and surcharges without substantial hardship; and (3) he raised a colorable claim of ineffective assistance of counsel.

Factual and Procedural Background

¶2 We review a trial court's ruling on a petition for post-conviction relief for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). In July 2008, Simmons was indicted for possession of a narcotic drug, a class four felony. Pursuant to a plea agreement, he pled guilty to the charged offense and admitted he had two historical prior felony convictions: possession of a narcotic drug in CR-20032242 and solicitation of possession of a narcotic drug and possession of drug paraphernalia in CR-20003090. The plea agreement stated, however, that the prior convictions were "not for enhancement purposes." Simmons had been sentenced for CR-20032242 in 2003 and for CR-20003090 in 2001. The plea agreement provided that no probation was available, and the trial court also found that "suspension of sentence and a term of probation are not appropriate . . . and that a sentence of imprisonment . . . is appropriate." The court sentenced Simmons to a mitigated term of two years' imprisonment. It also ordered him to pay $400 in attorney fees and imposed $1,680 in surcharges. Simmons filed a petition for post-conviction relief which the court denied. Quoting Ariz. R. Crim. P. 32.6(c), the court stated Simmons had failed to present a "'material issue of fact or law which would entitle [him] to relief,'" had failed to state any colorable claim, and that "'no purpose would be served by any further proceedings.'" This timely petition for review followed.

Discussion

¶3 Simmons first contends the trial court abused its discretion in denying his petition for post-conviction relief because his prior conviction in CR-20003090 was more than five years old and therefore was not an "historical prior felony conviction" under § 13-105(c)(22). He argues the definition of "historical prior felony" applies to § 13-901.01 and, as best we understand his argument, the court thus was required to place him on probation rather than sentence him to a term of imprisonment. Because Simmons failed to object at sentencing, we review only for fundamental, prejudicial error.[1] *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). However, imposing an illegal sentence, or one that is outside the statutory range, *State v. House*, 169 Ariz. 572, 573, 821 P.2d 233, 234 (App. 1991), constitutes fundamental error, *State v. Munninger*, 213 Ariz. 393, ¶ 11, 142 P.3d 701, 705 (App. 2006); *see also State v. Rubiano*, 214 Ariz. 184, ¶ 5, 150 P.3d 271, 272 (App. 2007) ("An abuse of discretion includes an error of law.").

¶4 We review questions of statutory interpretation de novo. *State v. Lewandowski*, 220 Ariz. 531, ¶ 6, 207 P.3d 784, 787 (App. 2009). "In 1996, Arizona voters enacted the Drug Medicalization, Prevention, and Control Act, commonly referred to as Proposition 200, which is codified primarily in [§] 13-901.01." *State v. Reinhardt*, 208 Ariz. 271, ¶ 1, 92 P.3d 901, 902 (App. 2004). In construing statutes adopted by initiative, such as § 13-901.01, our primary objective is to give effect to the intent of the

[1]Not only did Simmons fail to object below and request mandatory probation, but he in fact requested a mitigated 1.5-year prison term at sentencing.

electorate. *State v. Gomez*, 212 Ariz. 55, ¶ 11, 127 P.3d 873, 875 (2006). Accordingly, if the statute's language is unambiguous, we apply that language without using other means of statutory construction. *Id*. But, if the statute's language is ambiguous or unclear, "'we consider [its] context; its language, subject matter, and historical background; its effects and consequences; and its spirit and purpose.'" *Id.*, *quoting Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994).

¶5 Section 13-901.01 provides in relevant part that "any person who is convicted of the personal possession or use of a controlled substance or drug paraphernalia is eligible for probation" and shall be placed on probation, unless the person "[h]a[s] been convicted three times of personal possession of a controlled substance or drug paraphernalia." § 13-901.01(A), (H)(1). Section 13-105(c)(22), A.R.S., defines "historical prior felony conviction" as, inter alia, "[a]ny class 4, 5 or 6 felony . . . that was committed within the five years immediately preceding the date of the present offense."

¶6 The language of § 13-901.01 is unambiguous. It provides that a defendant is ineligible for probation if that defendant has "been convicted" of at least two previous drug possession offenses. This provision neither expressly nor impliedly requires the prior convictions to have occurred within a certain number of years of the current offense. Nor does it require that the prior convictions be "prior historical felon[ies]" as defined in § 13-105(c)(22). In fact, it does not require the prior conviction be a felony at all. Indeed, misdemeanor drug convictions count as "strikes" against a defendant's eligibility for mandatory probation under § 13-901.01. *See Foster v. Irwin*, 196 Ariz.

230, ¶ 9, 995 P.2d 272, 275 (2000) (noting California misdemeanor drug conviction counted as prior conviction under § 13-901.01); *see also Reinhardt*, 208 Ariz. 271, ¶ 1, 92 P.3d at 902 (referring to prior convictions as "strikes"); A.R.S. §§ 13-3405(A)(1), (B)(1) (possession or use of marijuana in amount less than two pounds class 6 felony); 13-604(A) (permitting court to designate class 6 felony class 1 misdemeanor). Convictions for possession of prescription-only drugs are convictions for the purpose of determining a defendant's eligibility for mandatory probation if those drugs are controlled substances. *See* A.R.S. §§ 13-3406(A)(1), (3)-(6), (B)(1); 13-901.01(J); 36-2501 (defining "controlled substance").

¶7 Simply because other provisions of the criminal code provide time limitations on the use of prior felony convictions for sentence-enhancement purposes does not necessarily mean, as Simmons suggests, there is "an obvious hole in A.R.S. § [13-]901.01." If the legislature had intended to define "conviction" narrowly in § 13-901.01(H)(1) as an "historical prior felony conviction" under § 13-105(c)(22) it would have so provided in plain and unambiguous terms. It did not.

¶8 Despite the plain language of § 13-901.01, Simmons argues the definition of "historical prior felony conviction" in § 13-105(c)(22) applies to the provisions of § 13-901.01. To support this proposition he relies on *State v. Campa*, 168 Ariz. 407, 814 P.2d 748 (1991), in which our supreme court addressed whether felony driving offenses under Title 28 are subject to the enhanced punishment provisions of former A.R.S. § 13-604 based on one or more similar prior felony convictions. *Id.* at 408, 814 P.2d at 749. In holding that they may be so enhanced, the court stated, "[T]itle 13 contains the

general sentencing scheme for criminal offenses" and "appl[ies] to *all* crimes, whether defined in Title 13 or elsewhere." *Id.* at 410, 814 P.2d at 751.

¶9 Simmons contends this latter statement makes § 13-105(c)(22), which is within Title 13 and is part of the general sentencing scheme for criminal offenses, applicable to § 13-901.01. But as the court in *Campa* explained, "Title 28 defines driving offenses and, in some instances, reclassifies them to felonies based upon prior offenses or license status. Title 13, on the other hand, specifies the punishment for crimes, including those defined in Title 28, and provides for enhanced punishment for repeat offenders." *Id.* at 411, 814 P.2d at 752. Thus, to determine the range of permissible sentences for an offense defined in Title 28, one must look to Title 13. *Id.* Unlike Title 28, however, § 13-901.01 does not define any offenses. Rather, it is a largely self-contained sentencing statute. "Notwithstanding any law to the contrary," it requires a court to sentence first- and second-time non-violent possession offenders to probation. § 13-901.01(A), (F). Only if a defendant "[h]a[s] been convicted three times of personal possession of a controlled substance or drug paraphernalia," § 13-901.01(H)(1), will Title 13 provisions other than § 13-901.01 define the defendant's sentence. The other Title 13 provisions, however, do not determine whether a defendant has met the criteria in § 13-901.01 for probation ineligibility.

¶10 Simmons's reliance on *Campa* is thus misplaced. Section 13-105(c)(22) does not restrict the types of prior convictions that are convictions for purposes of determining a defendant's eligibility for probation under § 13-901.01. Both misdemeanors and felonies, including historical prior felony convictions, may be

regarded as convictions that render a defendant ineligible for probation under §13-901.01. Accordingly, the trial court properly sentenced Simmons and committed no error, fundamental or otherwise, in denying Simmons's petition for post-conviction relief on this claim.

¶11 Simmons next contends the trial court abused its discretion in denying his petition for post-conviction relief because it had failed to make specific findings of fact regarding its imposition of fees and a surcharge. Simmons did not object during his sentencing hearing to the imposition of the fees or surcharge, and thus the court will have abused its discretion in denying his petition only if it had committed fundamental error in failing to make those specific findings. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 7, 185 P.3d 135, 138 (App. 2008) (attorney fees and surcharges assessment reviewed for fundamental error only when no objection below). Simmons specifically argues the court committed fundamental error in failing to make specific findings whether Simmons could pay the $400 in attorney fees and the $1,680 surcharge the court imposed without undue hardship. *See* A.R.S. §§ 11-584(C) ("[C]ourt shall take into account the financial resources of the defendant and the nature of the burden that the payment [for reimbursement of public defender duties] will impose."); 12-116.01(F) (court may waive required levy on fine if "payment . . . would work a hardship on the persons convicted or adjudicated or on their immediate families"); 12-116.02(D) (same for required penalty assessments); Ariz. R. Crim. P. 6.7(d) (court shall order defendant reimburse for appointed counsel "such amount as it finds [defendant] is able to pay without enduring substantial hardship to [defendant] or to [defendant's] family").

¶12 An examination of our decision in *Moreno-Medrano* is instructive. There, we considered whether the trial court had committed fundamental error in ordering the defendant to pay $400 in attorney fees and a $25 indigent administrative assessment without first ascertaining his financial ability to pay. 218 Ariz. 349, ¶ 7, 185 P.3d at 138. Acknowledging that the trial court had failed to make specific factual findings about the defendant's ability to pay without substantial hardship as required under § 11-584 and Rule 6.7, Ariz. R. Crim. P, we nonetheless concluded the court did not commit fundamental error. *Id.* ¶¶ 9, 14. We reasoned that the defendant had failed to show the court had not considered his financial ability to pay; that information being contained in reports before the court. *Id*. ¶ 14; *see also State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996) ("Judges are presumed to know and follow the law and to consider all relevant sentencing information before them."), *citing Walton v. Arizona*, 497 U.S. 639, 653 (1990).

¶13 Here, as in *Moreno-Medrano*, the trial court had Simmons's relevant financial information before it when assessing the fees and surcharge against him. The presentence report stated that Simmons had worked as a tree-trimmer between 2004 and 2007 for which he had been paid $10 per hour, and that he had worked laying tile immediately before his arrest. Although the report also stated that Simmons owned no assets, owed court fees, and had sustained a shoulder injury that caused him pain and required treatment he would not receive in jail, nothing in the presentence report, or any other report before the court, suggested that Simmons could not work because of his injury.

¶14 Simmons relies on *State v. Torres-Soto*, 187 Ariz. 144, 927 P.2d 804 (App. 1996), and *State v. Beltran*, 189 Ariz. 321, 942 P.2d 480 (App. 1997), to support his assertion that notwithstanding our decision in *Moreno-Medrano*, the trial court committed fundamental error here. In *Torres-Soto*, Division One of this court held the trial court had abused its discretion in imposing $85,500 in surcharges against an indigent defendant pursuant to §§ 12-116.01 and 12-116.02. 187 Ariz. at 145, 927 P.2d at 805. The court noted that it appeared "no one in the trial court understood that the surcharges and attorney[] fees were waivable for hardship reasons." *Id.* In a "virtually identical" situation, Division One concluded in *Beltran* that the trial court had abused its discretion in assessing a $64,900 surcharge against an indigent defendant. 189 Ariz. at 322-23, 942 P.2d at 481-82.

¶15 *Torres-Soto* and *Beltran* are readily distinguishable from the case before us. The trial court here assessed $2,080 in fees and surcharges against Simmons that he now contests. This assessment does not begin to approach the magnitude of either the $85,500 or the $64,900 surcharge imposed in *Torres-Soto* and *Beltran*, respectively. Although Simmons contends that for indigent defendants like him, "a $2000 fine may as well be a $50,000 fine," we cannot agree. None of the reports before the court indicated the fees or surcharge it imposed would create an undue hardship or that Simmons otherwise would be unable to pay them. And nothing in the record suggests the court was unaware it could waive the fees or surcharge. Accordingly, the trial court did not abuse its discretion in denying Simmons's petition for post-conviction relief on this issue because

it did not err fundamentally in failing to make specific factual findings regarding his financial resources.

¶16 Simmons last contends the trial court abused its discretion in denying his petition for post-conviction relief because he had stated a colorable claim, admittedly inartfully, of ineffective assistance of counsel. In his petition for post-conviction relief, Simmons asserted "the failure of counsel to request waiver [of the attorney fees and the surcharge] could be construed as ineffective assistance of counsel." Rather than argue the issue, however, Simmons "reserve[d] the right to consideration as ineffective assistance of counsel for trial counsel's failure to raise the issue." The court declined to consider Simmons's ineffective assistance of counsel claim, concluding it had been raised inadequately.

¶17 In his petition for review, Simmons contends this statement sufficiently raised a colorable claim of ineffective assistance of counsel. *See* Ariz. R. Crim. P. 32.8; *State v. Spreitz*, 202 Ariz. 1, ¶ 5, 39 P.3d 525, 526 (2002) (defendant entitled to evidentiary hearing if "colorable claim is presented"). A colorable claim for relief is one that, "if defendant's allegations are true, might have changed the outcome." *Watton*, 164 Ariz. at 328, 793 P.2d at 85. Bald assertions of ineffective assistance of counsel, however, are insufficient to state a colorable claim. A petition for post-conviction relief must contain "every ground known to [the petitioner] for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed," and these grounds must be supported by facts within the petitioner's personal knowledge, affidavits, record, or other evidence currently available to the petitioner. Ariz. R. Crim. P. 32.5. "Legal and record

citations and memoranda of points and authorities are required." *Id.* Simmons failed to argue or support his "reserve[d]" assertion of ineffective assistance in any meaningful way. The trial court thus did not abuse its discretion in finding Simmons had not raised the issue and therefore in declining to address it. The court did not abuse its discretion in denying Simmons's petition for post-conviction relief.

Disposition

¶18 For the foregoing reasons, although we grant Simmons's petition for review, we deny relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge